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DR CHAN CHOO LIP & ANOR

v.

JOSEPH LOI LIK KING & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[SUIT NO: KCH-22-15-2010-III]
23 OCTOBER 2012

C ***DAMAGES:*** *Assessment - Loss - Clinic raided by enforcement officers - Seizure of psychotropic medicines not listed in clinic's record book - Contravention of Poisons (Psychotropic Substances) Regulations 1989 - Press conference held by Deputy Director of Health (Pharmacy) Sarawak - Press conference published in newspaper - Whether clinic and doctor's*
D *reputation tarnished - Whether resulted in loss of corporate clients*

EVIDENCE: *Burden of proof - Malicious prosecution - Clinic raided by enforcement officers - Whether raid prompted by public tip off and surveillance or driven by malicious intent - Whether enforcement officer*
E *had ill-will against doctor - Whether there was history of relationship that could breed feelings of malice between parties*

TORT: *Malicious prosecution - Element of action - Clinic raided by enforcement officers - Seizure of psychotropic medicines not listed in clinic's record book - Whether prosecution with "intention to carry the law*
F *into effect" - Whether elements of malicious prosecution established - Poisons Act 1952*

The first plaintiff was a medical doctor who operated Lee Clinic, a private clinic ('the clinic'), which was owned by the second
G plaintiff. The clinic was raided two times by the enforcement officers of the Pharmacy Division of the Ministry of Health Sarawak. In the first raid, the first plaintiff was found to have kept proper records of psychotropic pills ('the pills') in the clinic. However, the officer who conducted the second raid ('the second
H defendant') found otherwise as it was discovered that 21 of the psychotropic medicines were not listed in the clinic's record book. Following the raid and seizure of the pills, a press conference was held by the Deputy Director of Health (Pharmacy) Sarawak ('the first defendant') which was prominently published by the *Borneo*
I *Post*. In *Borneo Post*, it was highlighted that an unnamed doctor was suspected and investigated for, *inter alia*, being involved in the supply of psychotropic pills. The findings of the second raid showed a contravention of the Poisons (Psychotropic Substances)

Regulations 1989 ('the Regulations') and subsequently, the first plaintiff faced criminal charges. During the trial, the first plaintiff tendered and produced in evidence the prescription registers, which showed that the record of drugs kept in the clinic were in order. The first plaintiff was then acquitted. In the present claim, the plaintiffs claimed against the defendants for the tort of malicious prosecution and abuse of process and submitted that, *inter alia*, (i) the criminal charges were preferred against the first plaintiff in bad faith; (ii) the first defendant had charged the plaintiffs with 'supplying the pills to the black market or for illicit purposes' even though investigations were still on-going; and (iii) that the second defendant had, in an abuse of authority and power, gone beyond her scope of duty to the extent of framing the charges against the first plaintiff. The first plaintiff also claimed for damages as it was alleged that he had lost many corporate clients due to the raid.

Held (dismissing claim with costs):

(1) If the first plaintiff had shown the prescription registers to the second defendant, there would have been a basis to say that the prosecution of the first plaintiff was without reasonable and probable cause. Without sight of the said registers by the Deputy Public Prosecutor ('DPP'), it could not be said that the criminal charges against the first plaintiff were not 'fit for trial'. The fact that the record of the drugs were found to be in order in the first raid did not relieve the first plaintiff of the requirement under s. 22 of the Regulations to maintain and keep a proper record of the drugs in his possession at the clinic. There was no reason to say that the second defendant was actuated and motivated by malice when she and her team raided the clinic. (para 15)

(2) The burden was on the first plaintiff to prove that the second raid at the clinic was prompted by a cause other than a public tip-off and surveillance at the clinic of the sale of illicit psychotropic substances thereat. The burden was also on the plaintiff to prove that it was in fact the feeling of ill-will towards him which led the said officer to his doorstep. Since there was not a shred of evidence adduced to show a history of relationship that could breed such feelings of malice between the first plaintiff and the second defendant, it could not then be concluded that there was malice on the part of the second defendant in the prosecution of the first plaintiff. (para 16)

(3) The DPP who sanctioned the prosecution of the charges against the first plaintiff was never called as a witness to be examined as to what facts stated in the investigation diary that drove him to give the green light for the charges to be registered. The second defendant's role in the raid, the investigation and the framing of the charges could not obliterate that of the DPP who sanctioned the charges. The prosecution of the charges against the first plaintiff as sanctioned by the DPP was done with the 'intention to carry the law into effect'. (paras 17 & 19)

(4) The press conference was unlike any other press conference called by enforcement agencies following a raid, a seizure and an arrest which yielded positive results and scores a point for that agency to the public. It highlighted the discovery without passing a judgment and did not reveal the identity of the culprit. The press conference was not to vilify the first plaintiff in the eyes of the public but was 'to educate private clinics on the importance of dealing with psychotropic substances according to the Poisons Act 1952'. The first defendant, who was not acquainted with the first plaintiff at the material time, only called for the press conference in his capacity as the Deputy Director of Health (Pharmacy) Sarawak and not with an ulterior motive or a personal vendetta against the first plaintiff. (para 21)

(5) There was no evidence to show that the corporate clients were had and lost. If at all the defendants sued in this case were liable for malicious prosecution, which they were not, the damages should be confined to the legal fees and the damage to the first plaintiff's reputation that should be assessed at RM200,000. The claim for RM1.3 million being the value of the pills seized but not returned should also be disallowed as the defendants should not be faulted. (para 22)

Case(s) referred to:

Glinski v. McIver [1962] AC 726 ***(refd)***
Herniman v. Smith [1938] AC 305 ***(refd)***
Hicks v. Faulkner [1878] 8 QBD 167 ***(refd)***
PP v. Yong Kong Hin [1981] CLJ 178; [1981] CLJ (Rep) 259 HC ***(refd)***
Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***
Williams v. Taylor [1829] 6 Bing 183 ***(refd)***

Legislation referred to:
Poisons (Psychotropic Substances) Regulations 1989, s. 22(a), (b)
Sale of Drugs Act 1952, s. 12(1)

For the plaintiffs - Sunny Si; M/s Si & Assocs
For the defendants - Mohd Taufik Mohd; SFC

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang J:

[1] The sleepy small town of Serian, about an hour's drive from Kuching was abuzz five years ago with a raid at one of a few private clinics serving its populace, Lee Clinic, which does not however take the name of its owner - it is operated by one Dr Chan Choo Lip (Dr Chan) and owned by a company, Trident Medical Services Sdn Bhd of which Dr Chan is the majority shareholder. There were in fact two raids by the enforcement officers from the Pharmacy Division of the Ministry of Health Sarawak - the first one was on 10 May 2007 which ended well for Dr Chan for it was found that the record of drugs kept in the clinic was in order.

[2] The second one, on 28 May 2007 spelt disaster for him for the raiding team led by one Rabiawati binti Omar ("Rabiawati") found a cache of psychotropic medicines at both the ground floor and the first floor of the clinic although Dr Chan was not a psychiatrist. He is a medical doctor who graduated with an MBBS from the National University of Singapore.

[3] Following the raid and seizure of the pills, a press conference was held by the Deputy Director of Health (Pharmacy) Sarawak, one Joseph Loi Lik King ("Joseph Loi") which was prominently published by the Borneo Post. It was highlighted in the newspaper publication that a doctor (unnamed) was suspected and investigated of being involved in the illegal supply of psychotropic pills and that the 52 types of pills discovered at the clinic was estimated to have a black market value of about RM1.3 million. The raid according to the report was from a tip-off from the public and a month of intelligence gathering.

[4] On 29 February 2008, Dr Chan filed a suit for libel (S-22-35-2008) against, *inter alia*, the Borneo Post and Joseph Loi which suit was subsequently dismissed on 19 August 2011. Then on 2 September 2008, Dr Chan was summoned, arising from the raid, to appear in the Sessions Court in Criminal Summons No. SC-63-65-2008-IV to answer a charge under the Control of Drugs and Cosmetic Regulations 1984 which is punishable under s. 12(1) of the Sale of Drugs Act 1952. This was followed by 32 other charges in Criminal Summons No. SC-63-94-2008-IV to SC-63-104-2008-IV. The first criminal summons was withdrawn by the prosecution on 28 January 2009 and Dr Chan was given a discharge and acquittal of the same. The Attorney General filed an appeal against the order of acquittal and discharge but later withdrew the appeal. The 32 charges also ended with a victory for Dr Chan when the same order was made after the trial, without his defence being called, on 27 August 2009. Almost five months later, Dr Chan filed another suit against Joseph Loi, Rabiawati, the Ministry of Health (Pharmacy Division) Sarawak and the Government of Malaysia for malicious prosecution and abuse of process. Dr Chan is joined in this action by Trident Medical Services Sdn Bhd, the owner of Lee Clinic.

[5] I presided over the trial of this action and this is the judgment for it.

Malicious Prosecution

[6] Mr Sunny Si for Dr Chan and Mr Mohd Taufik for the government officers and the Government are united in their common citation of the Federal Court case of *Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201 as laying down the elements for the successful prosecution of the tort of malicious prosecution. There are five of such elements, said Thomson LP, which I have taken the liberty to summarise below:

(i) The defendant must set the criminal law in motion against the plaintiff.

(ii) The criminal proceedings terminated in his favour.

(iii) There was no reasonable and probable cause for preferring the charges against the plaintiff.

(iv) The defendant was motivated by malice in doing so.

(v) The prosecution had caused damage to the plaintiff.

[7] In relation to the third element, what is reasonable and probable depends on the facts of each case (per Tindel CJ in *Williams v. Taylor* [1829] 6 Bing 183). The decisions of the past acknowledged how difficult it is to decide on this element and to determine the prosecutor's reason for instituting the criminal proceedings against the plaintiff. Hawkins J in *Hicks v. Faulkner* [1878] 8 QBD 167 at p. 171 defined it as "an honest belief in the guilt of the accused ...", Lord Atkin in *Herniman v. Smith* [1938] AC 305 at p. 316 said the question is "whether there is a case fit to be tried," whilst Lord Denning in *Glinski v. McIver* [1962] AC 726 at p. 758 held that the prosecutor "has only to be satisfied that there is a proper case to lay before the court ...".

[8] All these definitions I will bear in mind when I analysed the evidence presented at the trial.

Evidence Of Malice

[9] Mr Sunny Si in his written submission listed eight grounds why he believes that there was malice in the prosecution of the charges against his client. I reproduced the grounds below but have taken the liberty of changing his reference to the parties by substituting their names, rather than the plaintiff/defendant used by him. The grounds are:

(1) The 32 charges were really trumped up after the libel suit was filed by Dr Chan Choo Lip.

(2) The cavalier manner the charges were preferred or preferred deliberately, all in bad faith and abuse of powers on the defendants' part.

(3) The numerous roles performed by Rabiawati and getting mangled in the preparation of the charges.

(4) The concealment of material facts by Rabiawati:

(a) lying and hiding the real purpose of going to the clinic on 28.05.2007;

(b) concealing from the court the evidence of Tan Yien Nee's report;

(c) reckless disregard of the prescription registers which were available and the Ministry of Health record shows that these were available;

(d) trying to cover up the involvement of Joseph Loi.

A (5) The Press Conference was called by Joseph Loi on 29.05.2007 whilst investigation was still on-going is as good as charged the plaintiffs of "supplying the pills to the black market"/"for illicit purposes.

B (6) Joseph Loi lying and denying knowledge and involvement in drafting the Press Statement and calling the Press Conference.

(7) Rabiawati, in an abuse of authority and power, went beyond her scope of duty to the extent of framing the charges with the Deputy Public Prosecutor.

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(8) Ministry of Health, Pharmacy Division, Sarawak and Government of Malaysia led by Rabiawati and helmet by Joseph Loi is making an example of the raid by the State Health Department at the expense of the plaintiffs.

D **[10]** These points raised by him are dealt with collectively as follows.

The Starting Point

E **[11]** It has to be the second raid, not the first as contended by Dr Chan. Though the officer who conducted the first raid, one Tan Yien Nee found that Dr Chan had kept proper records of the psychotropic pills in the clinic, Rabiawati did not. As she testified in the Sessions Court, 21 of such medication were not F listed in the record book kept at the clinic which she inspected and the record of 11 of them do not tally with the quantity found upon their physical checking of the pills.

[12] All these showed a contravention of the Poisons G (Psychotropic Substances) Regulations 1989 by Dr Chan in particular s. 22(a) and (b) which provide that he:

(a) shall use a separate register or a separate part of the register with respect to each type of psychotropic substance;

H (b) shall enter in the register every quantity of psychotropic substance received by him whether for the purpose of sale, supply, manufacture, administration or any other purpose, the total stock of such psychotropic substance in his possession, the name and address of the supplier of such psychotropic substance, and the date on which such psychotropic I substance was received by him.

[13] The 32 charges in the Sessions Court were based on the physical inspection of the findings of Rabiawati and the result of her investigation is then forwarded to the Attorney General's Chambers of Kuching for further action. It was the learned Deputy Public Prosecutor who decided that there was basis for the prosecution of Dr Chan and signed the sanctions to prosecute him for each one of them. Dr Chan was acquitted without his defence being called because at the trial the defence tendered and produced the prescription registers (exhs. D4 to D22) and exh. D1 which was the checklist on the maintenance of the records Tan Yien Wee prepared from the first raid.

[14] However, as Mr Mohd Taufik correctly pointed out, Dr Chan never produced exhs. D4-D22 to Rabiawati during her inspection at the clinic. According to Dr Chan he did try to give the certified copies to the enforcement section of the Pharmacy Division but was given the standard answer "perkara ini masih dalam penyiasatan", loosely translated to mean that "the matter is still under investigation". I do not think that such an answer, if at all it was given, should have prevented Dr Chan from presenting them to the officers. He could have sent them by post and/or courier service if he did not want to hand them over personally to Rabiawati or the said enforcement section or the Attorney General's Chambers.

[15] If he had done that rather than a resigned sigh "What am I to do" as he expressed in his evidence at the trial, but the investigation papers were still forwarded to the Attorney General's Chambers and the criminal summons still registered with the court, I would have the basis to say that the prosecution of Dr Chan was without reasonable and probable cause. Without sight of the said registers by the learned Deputy Public Prosecutor, how could I say that the charges against Dr Chan were not "fit for trial"? Worst still, what reason do I have to say that Rabiawati was actuated and motivated by malice when she and her team raided the clinic and forwarded the investigation papers to the Attorney General's Chambers? The fact that Tan Yien Nee has found that the records of the drugs were in order that first time and as testified at the trial that the Ministry of Health has their own records of the purchase of psychotropic drugs by him, does not relieve Dr Chan of the requirement under s. 22 of the Poisons (Psychotropic Substances) Regulations 1989 to maintain and keep a proper record of the said drugs in his possession at the clinic.

[16] Further, the burden is on Dr Chan's shoulders to prove to the contrary that the raid at his clinic by Rabiawati was prompted by a cause other than the public tip-off and surveillance at the clinic of the sale of illicit psychotropic substances there at. That it was in fact the feeling of ill-will towards him which led the said officer to his doorsteps. Since there was not a shred of evidence adduced to show a history of relationship which could breed such feelings of malice towards each other, I cannot conclude my consideration, in his favour, of the evidence presented in support of this issue from the sole testimony of Dr Chan at the trial. Rabiawati, no doubt admitted in her evidence in the trial before me that she was also the investigating officer of the case who went to see the Deputy Public Prosecutor with the investigation papers, that she recorded statement from Dr Chan and his assistant at the clinic and kept all the exhibits pertaining to the case until her transfer from Kuching. Wearing too many hats of course is against the rule of prudence and expedience (see *PP v. Yong Kong Hin* [1981] CLJ 178; [1981] CLJ (Rep) 259) and which the more seasoned enforcement agencies such as the police would not have done. Offending those rules however does not translate to evidence of malice on her part in the prosecution of Dr Chan. She must be shown (and the same goes for Joseph Loi) to have done more to influence the learned Deputy Public Prosecutor to sanction the prosecution of all the charges in order to sustain the allegation of malicious intention levelled against her.

[17] Further more, the learned Deputy Public Prosecutor who sanctioned the prosecution of the charges were never called as a witness to be examined as to what facts stated in the investigation diary that drove him to give the green light for the charges to be registered. Rabiawati's role in the raid, the investigation and the framing of the charges cannot obliterate that of the learned Deputy Public Prosecutor who sanctioned the charges. To agree to Mr Sunny Si's submission that her wearing of the many hats and helping the learned Deputy Public Prosecutor to frame the charges shows abuse of power would belittle the professionalism and intellectual capacity of the learned Deputy Public Prosecutor who gave the sanction to prosecute the criminal charges.

[18] Though it is not denied that the prescription registers were available at the clinic at that time as testified in the criminal trial by Gan Huei Hsin, the other pharmacy officer who was present at the raid and that Rabiawati in her evidence before me admitted that she did not do a thorough inspection of the books and

records in the clinic but again these facts do not persuade me as proof of malice even when I consider them together with the other evidence discussed above.

[19] I am therefore constrained to conclude that the prosecution of the charges against Dr Chan as sanctioned by the learned Deputy Public Prosecutor was, in the circumstances of this case done with the "intention to carry the law into effect". (Per Thomson LP in *Rawther*'s case *(supra)* at p. 204 thereof). My consideration above which negates the evidence of malice are also relevant to show that the process of the law was not abused in the prosecution of the charge against Dr Chan.

[20] Dr Chan's case against Joseph Loi is even more flimsy because he did not know about the raid nor was he involved in the investigation which led to the charges being framed as testified by Rabiawati in her witness statement. However at the trial, much was made about the press conference with Joseph Loi held following the raid, that it should not have been held when the investigation into the case was still in progress.

[21] What I need to say about that press conference is this. It is not unlike any other press conferences called by enforcement agencies following a raid, a seizure and an arrest which yielded positive results and scores a point for that agency in the eyes of the public. In this particular case, it highlights the discovery without passing a judgment and did not reveal the identity of the culprit. It did not serve to vilify Dr Chan in the eyes of the public but "to educate private clinics on the importance of dealing with psychotropic substances according to the Poisons Act 1952" said Dzafarullah bin Daud (DW3), a pharmacy officer from the Ministry of Health, Putrajaya who was assigned to monitor the quantity and frequency of the purchase of psychotropic substances by clinics and pharmacies. In fact, he went with Rabiawati to raid the clinic and was the man who drafted the press release. Dzafarullah also confirmed Rabiawati's evidence that Joseph Loi did not know about the raid because he liaised with one Abu Hassan who was the head of enforcement of the Pharmacy Division in Kuching at that time. It was in Dzafarullah's evidence that the raid was conducted by their division in the Ministry of Health because of the high purchase of the psychotropic drugs by the clinic. On the

A evidence, I am satisfied that Joseph Loi, who was not acquainted with Dr Chan at that material time only called for the press conference in his capacity as the Deputy Director of the Pharmacy Division and not with an ulterior motive or a personal vendetta against Dr Chan.

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Damages

[22] Despite my conclusion above, I would, for the sake of completeness, address the issue of damages. Dr Chan testified that he lost many corporate clients such as CIMB Bank Berhad, C MARA and Sarawak Pepper Marketing Board because of the raid. He listed them in his evidence but other than his bare testimony; I have no other evidence to show that these clients nor the staffs of the clinic were had and lost or of his allegation that there were suppliers who lost their trust in him and refused to favour him D with goods on credit terms. But Dr Chan did prove the legal fees he paid to his defence counsel in the criminal trial of the 32 charges, Mr Shankar Ram who also testified in the trial before me that the legal fees paid to him was RM200,000. So if at all the defendants sued in this case are liable for malicious prosecution E and abuse of process (which I say they are not), damages should be confined to the legal fees and the damage to his reputation which I would assess at RM200,000, seeing that he is a professional who earns his living from practising as a medical F practitioner. Reputation for him, as would I suppose, other professionals with a private practice, is a crucial factor in determining its success.

[23] As for his claim for RM1.3 million being the value of psychotropic pills seized but not returned, I do not think the G defendants in this case should be faulted. The decision not to order so by the Sessions Court at the conclusion of the criminal trial, cannot be the basis upon which damages should be given in this case.

H **[24]** In conclusion, the claim herein is dismissed with cost of RM20,000.

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